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June 3, 2020

BY E-FILE

Roxanne Rothschild
Executive Secretary
Office of the Executive Secretary
National Labor Relations Board 1015
Half Street SE
Washington, DC 20570-0001

Re: 1199SEIU United Healthcare Workers East & Morrison Healthcare
12-RC-257857

Dear Ms. Rothschild:

Enclosed are Petitioner's Motion for Acceptance of Filing Under Rule 102.2(d), Sworn Affidavit of Micah Wissinger, and Petitioner's Motion for Reconsideration filed with the Executive Secretary on May 29, 2020. Copies of the same have been served via email to the individuals listed below.

Very truly yours,

Micah Wissinger

Encs.
cc:

Thomas P. Piekara
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1-1510-00001: 11130250

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MORRISON HEALTHCARE,

and **12-RC-257857**

SEIU UNITED HEALTHCARE WORKERS EAST

PETITIONER'S MOTION FOR ACCEPTANCE OF FILING UNDER RULE 102.2(d)

On May 29, 2020,[1] Petitioner 1199SEIU United Healthcare Workers East ("1199") filed a Motion for Reconsideration of the Order in *Morrison Healthcare*, 369 NLRB No. 76 (May 11, 2020) (the "May 11 Order"). The Office of the Executive Secretary notified Petitioner on June 3 that it rejected the May 29 Motion for Reconsideration as untimely under Section 102.65(e) of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations ("Rules").[2] For the reasons set forth below, the May 29 filing should not be considered untimely under that Rule. In the alternative, Petitioner requests that the Board accept the filing under Rule 102.2(d) because equity so demands, the error was excusable, and no prejudice will result from the three-day late filing.

It is Unclear What Filing Period Applies

Petitioner requested reconsideration of the May 11 Order in part due to the Board's material error in treating Respondent's April 27 Motion Objecting to Telephonic Representation

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[1] All dates contained herein are 2020.

[2] Respondent filed an opposition to Petitioner's Motion for Reconsideration on June 2, claiming that the motion was untimely. On June 2 Petitioner filed a reply to Respondent's Opposition. Contrary to the implication in Respondent's opposition, there was no intent by Petitioner to skirt the time period set forth in 102.65(e)(2) by citing to 102.48(c). *See* Respondent's Opposition at 2. Petitioner's citation to Rule 102.48(c) was simply an error.

Hearing (the "April 27 Motion") to the Regional Director of Region 12 as a request for review. The May 11 Order incorrectly states that Respondent "filed a request for review" in accordance "with Section 102.67." Respondent never filed such a request or mentioned Rule 102.67 anywhere in the April 27 Motion addressed to, and filed with, the Regional Director. The Board created procedural uncertainty when it *sua sponte* converted the April 27 Motion into a request for review.

Rule 102.65(e) governs, in pertinent part, reconsideration and review of Regional Director *decisions and reports*. That subsection provides that any motion for reconsideration under subsection (1) shall be filed "within 14 days, or such further period as may be allowed, after the service of the decision or report."[3] The decision or report to which subsection (2) refers is a decision or report of the *Regional Director*. It is unclear what rule sets forth a timeline for filing a request for reconsideration in this peculiar procedural context. Here, Petitioner seeks reconsideration of a *Board order* that improperly treats a motion to the Regional Director of Region 12 as a request for review. Accordingly, it cannot be said categorically that Petitioner's request for reconsideration was untimely because it is uncertain whether Rule 102.65(e) even applies in this situation.

The Board May Permit a Longer Filing Period Under Rule 102.65(e)

Even if subsection (2) of Rule 102.65(e) applies, it allows for filing a request for reconsideration within "such further period as may be allowed." The Board, therefore, has

[3] The decision of the Regional Director under Rule 102.65(e) was the April 22 direction to conduct a telephonic hearing which Respondent challenged in its April 27 motion. The Board, thereafter, treated that motion as a request for review which has a separate timeline for filing and opposition under 102.67(c) and (f).

discretion to grant a longer time period for filing a motion for reconsideration of its May 11 Order. There are multiple reasons why the Board should exercise such discretion here.

Through its May 11 Order, the Board endeavors to vastly remake federal labor policy—indeterminately delaying countless election petitions—through a ruling applying ULP procedures to R-case processing without *any* input from Petitioner or anyone in organized labor. Prior to considering an issue of such significance, no effort was made by anyone at the Board to reach out to counsel, knowing that only a union organizer was served with the improperly converted request for review styled as a motion to the Regional Director of Region 12.[4] Given the procedural uncertainty injected by the Board when converting a motion to Region 12 into a request for review, and lack of appearance by counsel for Petitioner prior to issuance of the May 11 Order, it would constitute further error for the Board to reject Petitioner's Motion for Reconsideration as untimely. This is especially true when Respondent does not, and cannot, allege that it suffered any prejudice because the filing occurred on May 29 instead of May 26.[5]

Finally, the extraordinary circumstances of the coronavirus pandemic militate in favor of allowing a further period for filing. Petitioner 1199 is a labor union headquartered in New York City, representing among its membership over 250,000 frontline healthcare workers toiling in hospitals and nursing homes at the epicenter of the fight against COVID-19 in New York, New Jersey, Baltimore and south Florida. The pandemic is a truly unprecedented event disrupting the

[4] Petitioner 1199 has had stable legal representation for the last thirty-four years, with counsel appearing in hundreds of cases before the Board and its various Regions.

[5] The Regional Director's Decision and Direction of election issued a few minutes before 5:00 p.m. on May 29. Petitioner's Motion for Reconsideration was filed at 6:27 p.m. that same day. The election is scheduled and will proceed notwithstanding the Board's intervention, the May 11 Order and Petitioner's Motion for Reconsideration. No delay in the scheduling or conduct of the election was caused, or will be caused, by Petitioner's supposed "late" filing.

functioning of unions, employers, and upending the Agency's most basic functions. This unforeseen and extraordinary event represents the very definition of an exigent circumstance for which an additional period for filing should be permitted, especially in a case where the procedure for review of Board action is unclear and no counsel appeared for the Petitioner until after issuance of the May 11 Order.

The Board Should Accept the Filing Under Rule 102.2(d)

As an alternative to accepting the Motion for Reconsideration under an additional period as permitted by Rule 102.65(e)(2), the Board is generally permitted under Rule 102.2(d) to accept late filings within a reasonable time after they are due "upon good cause shown based on excusable neglect and when no undue prejudice would result." In determining whether neglect is excusable, the Board considers all relevant circumstances, including: any prejudice to the non-moving party; the length of the delay and its potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the movant; and whether the movant acted in good faith. *See, e.g., Int'l Union of Elevator Constructors, Local No.* 2 *(Unitec Elevator Services Company)*, 337 NLRB 426, 427 (2002) (applying *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993)). The Board places the greatest weight on the reasons for the delay. *Id.*

Here, Petitioner filed its motion within three days after it was ostensibly due under Rule 102.65(e). Considering that the Rules do not provide a clear answer as to when the instant motion for reconsideration should have been filed and that counsel for Petitioner did not appear in the case until after issuance of the May 11 Order, filing the motion 17 days after issuance of

the May 11 Order was within a reasonable time.[6] Petitioner filed the Motion for Reconsideration as promptly as possible given the unique and perplexing circumstances. Any neglect by Petitioner to file within 14 days is was in good faith given the uncertainty in the rules, late appearance of counsel for Petitioner and the overall challenging circumstances under which Petitioner and its counsel are operating with closed offices and remote staffing.

As to the remaining factors, Respondent will not suffer any prejudice if the Board accepts the May 29 filing to reconsider its May 11 Order, nor will there be an impact on further judicial proceedings. The Board generally has ample justification for rejecting late filings that impact the processing of the case and/or cause detriment to litigants or the Agency. In the Board's most recent review of its rules concerning acceptance of late filings, *Unitec Elevator*—involving a late-filed brief where counsel miscalculated the filing date—the Board concluded that "a determination whether neglect is excusable is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *See* 337 NLRB at 427.[7]

Here, equity weighs in favor of accepting Petitioner's filing because the three-day delay will have absolutely no impact on the Agency's further processing of the case. Region 12 has scheduled an election. Should the Board accept Petitioner's Motion for Reconsideration, the only impact will be reconsideration by the Board of its own error—and correction of that error could have significant impact on the future processing of R-cases generally.

[6] Memorial Day (May 25) does not count in the computation for filing.
[7] Although the majority disagreed, in *KSL Claremont Resort, Inc.*, 344 NLRB 832, 833 (2005), Chairman Battista and Member Schaumber viewed the holding in *United Elevator* as limited to whether "the miscalculation of a filing date, absent a showing of extenuating circumstances" constitutes excusable neglect and not to other circumstances causing late filings.

Equity, therefore, requires that a motion to reconsider Board action on an issue of great national significance should not be rejected on technical application of a time period that does not unambiguously apply. The Board has discretion to allow further time for submissions under Rule 102.65(e) and should do so here. Petitioner, therefore, respectfully requests that the Board treat its May 29 Motion for Reconsideration as timely filed or in the alternative grant a short three-day "further period" for filing as is permitted under Rule 102.65(e)(2) or accept the filing under Rule 102.2(d) for good cause shown and lack of prejudice to any party.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Board accept its May 29 Motion for Reconsideration and consider that motion on the merits.

Dated: June 3, 2020

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Micah Wissinger, affirm under penalty of perjury that on June 3, 2020 I caused a true and correct copy of the foregoing document to be filed electronically with the Executive Secretary of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MORRISON HEALTHCARE,

and **12-RC-257857**

SEIU UNITED HEALTHCARE WORKERS EAST

SWORN AFFIDAVIT OF MICAH WISSINGER

I, the undersigned counsel for Petitioner 1199SEIU Untied Healthcare Workers East ("1199"), being duly sworn, depose and say as follows:

1. I am a member of the firm Levy Ratner, P.C. located in New York, New York. The firm has represented 1199 for thirty-four (34) years in hundreds of cases before the Agency.
2. Headquartered in New York City, 1199 represents over 400,000 members in New York, New Jersey, Maryland, Massachusetts and Florida. The overwhelming majority of the Union's membership works in healthcare settings, including hospitals, nursing homes, pharmacies and clinics. The Union has over 1000 employees dispersed throughout sixteen (16) separate offices.
3. I, along with Daniel J. Ratner, General Counsel of 1199, learned of the existence of this case on May 11, 2020[1] following issuance of the Board's Order remanding this case to the Regional Director of Region 12 to determine whether the preelection hearing would require witness testimony such that it could not be conducted by telephone pursuant to the rule announced that day in Morrison Healthcare, 369 NLRB No. 76.

[1] All dates herein are 2020.

4. On May 11, I reviewed the public information for this case on the Board's website to determine who was representing the Union, and discovered that no attorney had made an appearance for 1199. By reviewing the publicly available service documents for Respondent's April 27 Motion to Region 12, I obtained the name of a Union organizer unknown to me, Christella Dorval, who was involved in the case.

5. After locating Ms. Dorval on May 12 and speaking with her and her supervisor, Union Vice President Jude Derisme, I confirmed that Ms. Dorval filed the petition in this case without involving counsel because it was routine in nature.

6. Thereafter, Mr. Ratner requested that Kathleen Phillips, counsel to 1199's Florida Region, and I enter appearances as counsel in this case.

7. Ms. Phillips entered an appearance as counsel on May 13.

8. I entered an appearance as counsel on May 14.

9. I began drafting a motion for reconsideration on May 14.

10. I have been teleworking since March 11 because my firm has been closed due to the COVID-19 pandemic.

11. During the period between when I began working on the motion and filed it, I had primary childcare responsibility for two young children whose schools were closed due to the coronavirus. I also was involved in representing 1199 in other matters involving members who, as frontline healthcare workers, have been facing daily challenges of an emergency nature.

I have prepared and read this Sworn Affidavit consisting of 3 pages, including this page, I fully understand it, and I state under penalty of perjury that it is true and correct.

MICAH WISSINGER

Sworn to before me this
3rd day of June, 2020

AMANDA POTAMITIS
Notary Public, State of New York
No.01PO6225550
Qualified in Queens County
Commission Expires July 26, 2022

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MORRISON HEALTHCARE,

and **12-RC-257857**

SEIU UNITED HEALTHCARE WORKERS EAST

PETITIONER'S MOTION FOR RECONSIDERATION

In accordance with Section 102.48(c) of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, 29 C.F.R. § 102.48(c), Petitioner 1199SEIU United Healthcare Workers East moves for reconsideration of the Board's May 11, 2020 Order, *Morrison Healthcare*, 369 NLRB No. 76 (May 11, 2020) ("the Order"). Petitioner moves for reconsideration because the disposition of this case involved "material error[s]" fatal to the Board's Decision. 29 C.F.R. § 102.48(c)(1). Those material errors include, *inter alia*, failing to engage in reasoned decision making when incorporating rules for unfair labor practice ("ULP") cases into preelection representation case procedure, abandoning the statutory mandate to provide "an appropriate hearing" and neglecting the Agency's responsibility to promptly and efficiently process election petitions. Without satisfactory justification, the Order imposes ULP-based videoconferencing "safeguards" into representation proceedings where, unlike ULP cases, witness credibility determinations are not made. Reconsideration is also warranted because the Board improperly treated Respondent's April 27, 2020 Motion Objecting to Telephonic Representation Hearing to Region 12 (the "Motion") as a request for review.

These material errors require the Board to reconsider and vacate the Order.

1. The Board committed material error by failing to substantively consider the unique nature of preelection representation case hearings when applying ULP, or "C" case, practice and procedural rules to representation, or "R" case, practice and procedure under the National Labor Relations Act ("NLRA" or "Act"). There is longstanding recognition that representation proceedings are investigative, non-adversarial and not subject to the strictures of the Administrative Procedures Act's rules governing "adjudications." *See, e.g., Willett Motor Coach Co.*, 227 NLRB 882, 887 (1977) (stating that 5 U.S.C. § 554(a)(6) of the APA does not apply); *Edwin H. Goodwin and George G. Goodwin d/b/a Pacific Tent & Awning Co.*, 97 NLRB 640, 641, n. 1 (1951) (same). More pointedly here, "A pre-election hearing is investigatory in nature and credibility resolutions are not made." *Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1084 (2001). Separate and distinct portions of the Act govern procedures in ULP and representation cases. The procedure to be followed in ULP cases is outlined in some detail in Section 10 of the Act (29 U.S.C.A. § 160), while the procedure to be followed in ordinary representation cases is outlined in Section 9(c) (1) of the Act (29 U.S.C.A. § 159). These procedures are fundamentally different.

Nevertheless, with insufficient examination of the differences, the Order: (1) imposes upon preelection proceedings the stringent videoconference "safeguards" applicable to ULP witness testimony set forth in Section 102.35(c) of the NLRB's Rules and Regulations ("the Rules") and (2) bans the use of preelection hearings via telephone where a witness might prove helpful to the Regional Director's determination of whether a question concerning representation exists. The Board's reasoning for imposing these rules in R cases is unsupported by the Board's practice, procedure and history.

The Order acknowledges that the Rules relating to representation hearings do not contain an equivalent to Section 102.35(c); in fact, they do not in any way restrict or condone the use of video or telephone information gathering in preelection proceedings. Nevertheless, without substantive analysis, the Board imposes these "safeguards" on preelection procedures. The Order brushes aside the fundamental dissimilarities between preelection proceedings and ULP litigation with a cursory discussion of *Westside Painting, Inc.*, 328 NLRB 796 (1999), a ULP case involving telephonic testimony from an alleged discriminatee. *See* Order at 1. In *Westside Painting,* the Board recounted a longstanding preference for live testimony in ULP hearings, finding it particularly important in that context because "a judge is often presented with situations where there is conflicting testimony and credibility" such that those determinations "are central to the resolution of the case." *Id.* at 797.

Although cross-examination of witnesses is permitted in preelection hearings, credibility and demeanor are not material because the purpose of the hearing is determining what *questions* exist, not resolving them through credibility assessments or traditional adjudication. Prior to listing "appropriate safeguards" for remote witness testimony in Section 102.35(c)(2), the Rule states that its very purpose is to "ensure that the Administrative Law Judge has the ability *to assess the witness's credibility*…." (emphasis added). The Board's reliance on that ULP casehandling rule as the basis to make impactful and lasting rules related to R case practice and procedure—without undertaking an examination of the framework for preelection representation proceedings—constitutes material error. *See, e.g.*, *Solar Int'l Shipping Agency, Inc.*, 327 NLRB 369, 370 (1998) (finding that cases involving "adversarial ULP proceedings" were not controlling over the Agency's decision to pay for interpreters in preelection proceedings).

Representation case procedures are set forth in statute, regulation, caselaw and further explained in detail in the General Counsel's Casehandling Manual. A preelection representation proceeding "is nonadversary in character [and] is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case." *Id.* (citing Sec. 101.20(c) of the Board's Statements of Procedure). The Agency "is responsible for a complete record" in a preelection hearing. *Id.* at 370. The Order neglects to compare/contrast Agency unfair labor practice proceedings that are heavily centered on credibility determinations with the purely investigative preelection hearing.[1]

As controlling authority makes clear, the absence of "reasoned decision-making" establishing the Board's consideration of all relevant factors renders the Order inherently arbitrary, capricious and untenable. *See ABM Onsite Servs.-West, Inc. v. NLRB*, 849 F.3d 1137,

[1] In addition to C cases being adversarial and R cases not being and C cases requiring resolution of conflicts in testimony based on credibility assessment and R cases not so requiring, a non-exhaustive comparison would include:

- The rules of evidence are not controlling in R cases as they are in C cases. *See* Section 11216 of the NLRB's Casehandling Manual;
- The overwhelming considerations when introducing evidence in R cases are relevance, completeness, and brevity. *Id.*;
- In contrast to C cases, there is no set order of evidence/witness presentation in R cases. Not only can the hearing officer can call witnesses, but parties may reopen their cases to present additional facts. *Id.* at 11218.
- "The role of the hearing officer in a postelection challenges and/or objections hearing significantly differs from the role of the preelection hearing officer. For example, in a postelection hearing, the hearing officer makes (1) credibility resolutions and (2) findings, conclusions and recommendations, whereas the preelection hearing officer does neither." *Id.* at 11424.3(b); and
- A hearing officer in an R case should not grant a motion to sequester witnesses in a preelection hearing because the hearing is non-adversarial in character and credibility questions are not resolved by the hearing officer. *See, e.g.*, *Fall River Savings Bank*, 246 NLRB 831 n.4 (1979) (R cases hearings are not adversarial).

1142 (D.C. Cir. 2017) (Board's failure to explain its reasoning violates "the cardinal rule" that "an agency may not act in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law") (citations and quotations omitted); *see also Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (2018) ("The Board's analysis . . . must be grounded in the complete record and must grapple with evidence that 'fairly detracts from the weight of the evidence supporting [its] conclusion.'") (quoting *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999)); *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017) ("[R]easoned decisionmaking" requires showing that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made"; NLRB decisions are arbitrary and capricious when they "evidence[] a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence") (citing *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Board committed material error in perfunctorily considering the unique nature of investigatory preelection representation cases while introducing restrictive ULP case practice and procedure into those proceedings.

2. The Board also committed material error when it failed to uphold the statutory directive to offer an "appropriate hearing" for representation cases. As recently explained in the context of Agency rulemaking, the Act "sets forth only the basic steps for resolving a question of representation." *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69525 (Dec. 18, 2019). Essentially, the Board investigates an election petition and where it has "reasonable cause to believe that a question of representation exists, provides an appropriate hearing upon due notice,

unless the parties agree that an election should be conducted and agree concerning election details." *Id.*; *see also* Section 9 of the Act (29 U.S.C.A. § 159).

The term "appropriate hearing" comes from the original 1935 Wagner Act. As stated by the Supreme Court: "The section is short. Its terms are broad and general…Obviously great latitude concerning procedural details is contemplated." *Inland Empire Council v. Millis*, 325 U.S. 697, 706-710 (1945). When Congress revised the Act to require that hearings be held prior to an election, it left the essential "appropriate hearing" language intact. *See, e.g.*, Rulemaking Representation—Case Procedures, 79 FR 74308-01 (2014) (explaining this history when adopting procedures to regulate issues addressed in preelection hearings).

Admittedly, the pandemic circumstances in which the instant Order arises are unprecedented. Daunting as it might be for the Agency to fulfill its statutory mandate without the benefit of in-person hearings, the Board is still required to employ sound reasoning. The Order categorically prohibits telephone hearings in cases involving witnesses while imposing stringent ULP-based videoconference rules divorced from any Agency directive concerning how, or when, R case videoconferences might occur or any indication whatsoever that the Agency is capable of conducing preelection hearing via videoconference.

Aside from a May 15, 2020 press release announcing that effective June 1, 2020 the NLRB's Division of Judges will resume conducting ULP hearings on a case-by-case basis using videoconferencing technology, the Agency has not offered the public any substantive information about its videoconferencing capabilities nor any assurance that it will be able to offer such services for R cases in the near future. Anecdotal evidence suggests that many regions do

not have the capacity to conduct video hearings.[2] At present, petitioners must either wait until individual Regions are able to resume in-person hearings (which may be months away in some locations) or wait until the Agency acquires the capability to conduct the type of video hearings it now orders. In either instance, the Board fails to make provision for an "appropriate hearing" in preelection proceedings that might benefit from witnesses.

Here, the Board unquestionably failed to engage in reasoned decision making. Doing so required an examination of the current situation while articulating a satisfactory explanation for ordering ULP-type video hearings the Agency is unprepared to conduct.

Although in the instant matter Region 12 was able to conduct a preelection proceeding via telephone pursuant to a May 12, 2020 order of the Regional Director rescheduling the hearing because witnesses were not needed, the Board's Order will have a profound impact on the processing of countless petitions nationwide, and thus this motion is not moot. As an administrative agency, the Board's concerns "transcend those of the litigants in a specific proceeding" requiring the Board to weigh the interests of accuracy, efficiency and speed when in formulating election standards designed to effectuate majority rule. Representation-Case Procedures, 84 Fed. Reg. at 69527. Reconsideration is required here because the interests of this case have broad nationwide impact as the Order constitutes both material error and a

[2] On May 12, 2020 the Deputy Chief Administrative Law Judge issued an order rescheduling a hearing in *Jersey Shore Steel*, 06-CA-235415 indicating that the Board will not have a Zoom license for conducting ULP hearings until June 22. During a public May 27, 2020 call to discuss implementation of the Agency's new election rules, the Regional Director of Region 2 stated that the Region had no guidance concerning conducting preelection video hearings, the Region would circulate instructions once they have them, and the "ALJs are experimenting" with videoconferencing.

relinquishment of the Board's statutory mandate to provide "appropriate hearings" when processing all election petitions.

3. Relatedly, the Board erred materially by abdicating the Agency's responsibility to promptly and efficiently process election petitions. The Act charges the Board with "promulgat[ing] rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." 84 Fed. Reg. at 69526-6592. In explaining recent modifications to R case rules, the Board stated that to effectuate the purposes of the Act when investigating an election petition, it must balance "timeliness, efficiency, fair and accurate voting, transparency, uniformity, and adapting to new technology." *Id.* at 69527 (citing prior representation case rulemaking at 79 Fed. Reg. 74315-74316). The Order, however, spells substantial and indefinite delay in processing any petition involving a respondent who stalls the process by raising a single gratuitous issue requiring explanation from a witness.[3] The Board did not balance the factors it must weigh in processing questions concerning representation because to timely process petitions without in-person investigative hearings means providing a mechanism for assessment of those questions, whether by telephone, written submission, or otherwise—not ordering videoconferencing that the Agency is not in a position to deliver. Moreover, efficiency in this context means doing only what is necessary, not imposing ULP hearing "safeguards" that go beyond what is needed to achieve the unique investigative goals of preelection hearings. Upon reconsideration the Board must undertake a balancing analysis to provide a meaningful and

[3] This would not be nearly as problematic had the Board not recently modified R case rules effective May 31, 2020 to require prehearing resolution of issues previously resolved post-election. 84 Fed. Reg. 69524 (Dec. 18, 2019).

considered response to the question of how to promptly and efficiently process election petitions when witnesses cannot appear at a hearing.

4. Finally, the Board committed error in converting Respondent's Motion to Region 12 into a Request for Review by the Board. On April 27, 2020, Respondent filed a motion captioned as before "The National Labor Relations Board, Region 12" and styled as "Employer's Motion Objecting to Telephonic Representation Hearing" that was served on the Union's organizer and the Regional Director of Region 12.[4] Upon information and belief, when the April 27 Motion was e-filed using the Agency's online platform, in addition to filing with Region 12, Respondent e-filed a copy of its April 27 Motion with the Board's Executive Secretary. Three days later the Board *sua sponte* issued a stay of the telephonic hearing less than thirty (30) minutes before its appointed commencement by a hearing officer in Region 12. Whether by design or not, the Board selected a case for imposing ULP video hearing "safeguards" on R case processing— shelving an untold number of election petitions for an indeterminate amount of time—in which no opposition was filed by Petitioner and no attorney appeared on its behalf. Although the Board's Rules permit granting a request for review prior to receiving an opposition,[5] it did so in a case in which no such request was actually made. There does not appear to be any precedent for the Board converting such a motion into a request for review,

[4] The instant election petition was considered so routine that a non-lawyer organizer filed it and was the only Union representative served with a copy of the Motion addressed to Region 12.

[5] Even though the rules permit a grant of a request for review prior to the filing of an opposition, the Board's long-standing practice is to grant review and permit further briefing before deciding the merits. Proceeding directly to the merits without even an opposition to the request is virtually unprecedented and is unprecedented on a question of this importance.

certainly not one without the benefit of an opposition from Petitioner or with as great an impact on the processing of representation cases.

CONCLUSION

Application of the proper legal standard in this case requires an outcome different from that in the Order. The Agency has a statutory mandate to promptly and efficiently process election petitions and provide for an appropriate hearing when needed. Upon reconsideration, the Board must provide well-reasoned procedures and rules for conducting preelection proceedings when it is unable to benefit from in-person hearings. For all the foregoing reasons, Petitioner's Motion for Reconsideration should be granted in full and the Board's May 11, 2020 Order should be vacated in its entirety.

Dated: May 29, 2020

LEVY RATNER, P.C.

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Micah Wissinger, affirm under penalty of perjury that on May 29, 2020 I caused a true and correct copy of the foregoing document to be filed electronically with the Executive Secretary of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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